IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA Plaintiff, vs. JEFFREY WAYNE POWELL Defendant.	Case No: 19-CR-69-F

ORDER ON MOTION TO SUPPRESS

This matter comes before the Court upon Defendant's Motion to Suppress filed on August 16, 2019. (ECF Document. 19). Defendant Jeffrey Wayne Powell seeks to suppress evidence of methamphetamine and methamphetamine distribution recovered from his home during the execution of a search warrant by Campbell County deputies on January 16, 2019. On September 18, 2019, the Court held an evidentiary hearing on the matter at which Mr. Powell, represented by counsel Steven Titus, and the United States, represented by counsel Stuart Healy, presented evidence and arguments.

The Court has considered Mr. Powell's motion, the United States' response, the documentary evidence, testimony, and oral arguments presented at the evidentiary hearing, and is fully informed in the premises. For the following reasons, Mr. Powell's Motion to Suppress is DENIED.

BACKGROUND

Mr. Powell was arrested for the incident giving rise to the charges in this case on January 16, 2019. At the time of his arrest, Mr. Powell resided at 1708 Gold Road, located on Lot 14A of Champion Ventures Subdivision ("Lot 14A") just outside Gillette, Wyoming in Campbell County. (Gov't Ex. 9, 12). Lot 14A, and the corresponding address of 1708 Gold Road, is the site of Anytime Storage, a 24-hour storage facility. (Gov't Ex. 10, 11).

Mr. Powell's then-residence, which he rented from the owners of Anytime Storage, is connected to the business office of Anytime Storage in the southwest corner of Lot 14A. (Gov't Ex. 9, 13). At the evidentiary hearing, the Court received evidence including aerial, body camera, and street-view images of the property, and heard testimony regarding the position of the residence within the storage yard. The parties each stressed the position of Mr. Powell's residence in relation to the surrounding public storage facility. At the outset and to frame the flow of factual events, the Court briefly recounts the property's pertinent characteristics:

Lot 14A, owned entirely by Carlson LaShawn's Revocable Trust (Gov't Ex. 12, 13) is located at the intersection of Gold and Hackathorn Roads. (Gov't Ex. 14). On the west portion of Lot 14A, a building described as a single-wide trailer with an attached garage houses both Mr. Powell's former residence and the business office of Anytime Storage.[1] The west side of the building opens onto Hackathorn Road via a residential driveway.

[1] It is unclear to the Court, from evidence and arguments at the hearing, whether the business office of Anytime Storage still operates as such, or whether the entirety of the structure was, on January 16, 2019, dedicated to residential space. However, storage unit customers still use slots on the southern door of the building to deposit rent payments. (Def. Ex. A).

The residence/office is intimately connected with the surrounding storage yard. The residence/office is accessible by two different doors on the east side of the building, both of which open onto the storage yard. The closest storage unit is roughly 20-30 feet away from the residence/office. Immediately north and adjacent to the residence/office, customers of Anytime Storage typically store cars, boats, and other large items. (Gov't Ex. 1, 3). The entire lot, including the storage row and residence/office, is encompassed by a barbed wire fence, which has one opening on Gold Road, and another on Hackathorn Road, that customers may use to access the storage yard. (Gov't Ex. 5). As noted above, the residence/office and storage facility share an address. (Gov't Ex. 9, 10, 11).

The residence/office is surrounded by a concrete pad, except for a semi-grassy area enclosed by a chain-link fence bearing a "No Trespassing" sign (Def. Ex. D, Gov't Ex. 4), which runs along the southern and western sides of the structure, stopping south of the driveway and garage. (Gov't Ex. 4). Apart from this enclosure, only a small sign on the southern entrance to the building indicates the residential usage of the building and that it is not available to Anytime Storage customers except to deposit rental payments through a mail drop. (Def. Ex. A). The Court will provide additional description of Lot 14A and the residence/office as necessary for its analysis.

In the early morning hours of January 16, 2019, deputies Rich Lang and Eric Coxbill of the Campbell County Sheriff's Office were conducting surveillance of Anytime Storage from an elevated off-site vantage point on Gold Road. Although one witness testified that it is common for officers of the Campbell County Sheriff's Office to conduct nighttime surveillance, or "security checks," of Gillette's storage facilities to prevent theft, their

purpose in surveilling Anytime Storage on January 16 related to information that Mr. Powell was distributing controlled substances from the residence. (Gov't Ex. 2 at 1–2). This information included the January 14, 2019 stop and subsequent arrest of an individual found to be in possession of marijuana after leaving the storage facility. (*Id.* at 2).

During their surveillance, between 1:30 and 2:30 a.m., Deputies Coxbill and Lang observed four vehicles come and go from the residence and office structure. Given the deputies' belief on previous information that drug trafficking was occurring in the storage area, but because they were unable to find traffic violations to stop any of the vehicles as they left the storage yard, the deputies decided to conduct a "knock and talk" to attempt contact at the residence with Mr. Powell. The deputies contacted a third officer, Deputy Cox, to aid in this attempt. Following Deputy Cox's arrival at the surveillance site, the deputies entered Lot 14A by car to attempt contact with Mr. Powell. The deputies observed lights on in the residence/office and, having observed traffic to and from the residence, believed Mr. Powell to be awake in his residence despite the early morning hour. (Gov't Ex. 2 at 2).

At approximately 2:50 a.m., the deputies approached the east side of the residence/ office at one of its doors. (Gov't Ex. 2 at 1). Deputy Cox's body camera recorded the officers as they approached the building. (*Id.* at 3). Deputies Coxbill and Lang knocked at the northernmost door on the east side of the building, which they believed to be the main entrance to the residence portion of the building.[2] After waiting a moment for a

[2] Evidence presented at the hearing showed two doors on the east side of the building. (Gov't Ex. 5). Mr. Powell testified that the door at which the deputies knocked was not, in fact, an entrance

response, Deputy Cox proceeded on a sidewalk bordering a car storage area on the north side of the building, which attaches to the driveway area on the west side of the structure (Gov't Ex. 1 at 2:22-2:24). Officer Cox testified that his purpose was for safety, and to "make sure nobody was going to try and run or come up behind us." On the west side of the house, Deputy Cox stood briefly on the walkway at a gap between the garage and a fence bordering the driveway. (Gov't Ex. 1 at 2:43). Apparently, the deputy did not observe anything unusual, and thus returned to the door on the east side of the house where Deputies Coxbill and Lang still stood at the door. Seeing that the deputies' knock remained unanswered, Deputy Cox walked back on the sidewalk to the garage. (*Id.* at 3:14). After briefly pausing at the gap, Deputy Cox sniffed audibly, such that it can be heard in the body cam footage, and moved closer to the garage until he was only a few inches from the garage door. (*Id.* at 3:14-3:37). He returned to the east side of the house, where he reported to Deputies Coxbill and Lang that the smell of marijuana was emanating from the garage and that he heard voices from within the garage. (*Id.* at 4:05). All three deputies then proceeded to the garage exterior, where Deputies Coxbill and Lang confirmed the presence of the odor. (*Id.* at 4:38).

Deputy Cox applied for and received a state search warrant. (Gov't Ex. 2). The deputies returned to the residence shortly thereafter, at which time they executed the

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he primarily used or even an entrance to the residence itself, despite the fact it was affixed with a camera doorbell at the time. Rather, Mr. Powell considers the southernmost door his "front door." The "front door" bears a notice reading, "Attention: This is now a private residence, not the office." (Def. Ex. A). However, that door also bears a "Rent Drop" slot to accept rental payments, and thus still serves rental unit customers. (*Id.*). There is an additional door on the west side and a man door into the garage. (Gov't Ex. 7).

warrant. (*Id.*) Their search yielded discovery of over a pound of methamphetamine and evidence of methamphetamine distribution. Mr. Powell now seeks to suppress the evidence seized in execution of the warrant on the basis that the deputies had developed probable cause for a warrant while performing an unlawful search in the curtilage of the residence. (Doc. 19).

DISCUSSION

Mr. Powell seeks to suppress the evidence of narcotics and narcotics distribution recovered from his home, arguing the evidence is fruit of an illegal search. The basis of his motion to suppress is that the deputies were unlawfully in the curtilage of his home when they smelled the marijuana, the odor of which gave cause for the search warrant, and subsequent discovery of methamphetamine in the residence. Under the fruit of the poisonous tree doctrine, the exclusionary rule bars the admission of evidence obtained directly or indirectly as a result of unconstitutional police conduct, such as that which violates the Fourth Amendment. *Wong Sun v. United States*, 371 U.S. 471, 485–88 (1963). It is clear under the doctrine that if the deputies' observation of the marijuana occurred during an unconstitutional search, the evidence seized during the later search executed pursuant to warrant would be inadmissible as fruit of the poisonous tree. *See Murray v. United States*, 487 U.S. 533 (1988).

The United States responds that this was not an unreasonable search because the deputies were lawfully on the premises when they perceived the smell of marijuana. It asserts the deputies had a sufficient and legitimate objective in seeking to interview Mr. Powell and that the Fourth Amendment was not violated by the "knock and talk"

investigative technique. Further, the United States argues that Mr. Powell could not have had a reasonable expectation of privacy because the area immediately adjacent to the residence, which Mr. Powell claims to be curtilage, was readily accessible to the public as part of the storage facility yard. Ultimately, the United States asserts the deputies' conduct was reasonable, in light of the circumstances including the 24-hour nature of the facility, the fact that lights were on in the home, the commingling of the residence with the business property, and because the "knock and talk" is a standard form of investigation.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST., amend. IV. "The hallmark of Fourth Amendment analysis is whether a person has a 'constitutionally protected reasonable expectation of privacy.'" *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (quoting *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J. concurring)). A two-step analysis is used to determine whether an expectation of privacy is reasonable. *Katz*, 389 U.S. at 361. First, the individual must have subjectively exhibited an expectation of privacy in the object of the challenged search. *United States v. Dunn*, 480 U.S. 294, 301 (1987). The second point of analysis is objective, requiring the court to consider whether the individual's expectation of privacy is "one that society is prepared to recognize as reasonable." *Id.* (quoting *Katz*, 389 U.S. at 360 (Harlan, J. concurring)).

Mr. Powell has satisfied the first, subjective prong of *Katz* by his own assertion that he had an expectation of privacy in his driveway. At the time he lived at 1708 Gold Road, he had also exhibited this expectation, as to some areas surrounding the residence, with a "no trespassing" sign.

The second prong of *Katz* presents a more difficult analysis for the Court and requires the Court to determine whether the area traversed by the deputies on January 16 was curtilage. Curtilage is the area immediately surrounding a residence and it is well established that "[t]he curtilage area. . . [is] a place where the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept." *Dow Chem. Co. v. United States*, 476 U.S. 227, 235 (1986). The rationale for so extending the protections against Fourth Amendment searches normally enjoyed by the home sphere is that curtilage "is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States,* 116 U.S. 616, 630 (1886)). The curtilage of a home "has been considered part of home itself for Fourth Amendment purposes," and "warrants the Fourth Amendment protections that attach to the home." *Id.*

Defendant and the United States disagree as to whether the area surrounding the home should be characterized as curtilage, and therefore be entitled to the objectively reasonable expectation of privacy that protects curtilage from certain governmental searches. In *United States v. Dunn*, the Supreme Court set forth four factors to consider in determining whether an area is curtilage: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. 480 U.S. 294, 301 (1987).

1. Proximity of the area claimed to be curtilage to the home

Here, Deputy Cox was indeed mere inches from the garage, on the driveway, when he perceived the marijuana, and this factor tends to weigh in favor of Mr. Powell. (Gov't Exh. 1). However, the characteristics of the property, as a whole, tend to exclude from the definition of curtilage the areas traversed by the officers, as indicated by an analysis of the remaining three factors.

2. Whether the area is included within an enclosure surrounding the home

With regard to the second *Dunn* factor, the driveway where the officers stood is not enclosed except by a short fence with gaps providing access from the sidewalk that borders the building, as well as from the road. At no point did the Deputies enter an area marked closed to public access by fencing or signage. In fact, the sidewalk area immediately north of the building appears to be space available for customers to store cars, boats, and other large items, suggesting it is property open to the public for rental purposes 24 hours a day.

3. The nature of the uses to which the area is put

The fact that the north side of the residence/ office is available for commercial storage also bears on the third *Dunn* factor, which gives weight to the nature of uses to which a space is put. Here, the area immediately surrounding the residence is a commercial storage facility. The residence is owned by the storage facility, is used for business-related purposes (*i.e.*, accepting rent checks), and it shares an address with the storage site. The residence is a mere 20-30 feet from storage units made constantly accessible to the public for storage purposes. Thus, the application of this *Dunn* factor to the east and north sides of the residence clearly weighs in favor of the United States.

The application of the third *Dunn* factor to the driveway area does not lend the basis for such a straightforward analysis. Unlike the areas to the north and east of the residence, the driveway faces away from the storage yard and Mr. Powell appears to have used the driveway for primarily personal purposes exclusive to the residence.[3] However, driveways themselves are public in nature. As the Tenth Circuit has noted, "[t]he openness and accessibility of a driveway to the public has been an important factor that courts have used to conclude that an owner does not have a reasonable expectation of privacy and that police observations made from the driveway do not constitute a search." *United States v. Hatfield*, 333 F.3d 1189, 1194 (10th Cir. 2003). Thus, the Court finds that this *Dunn* factor weighs in favor of the United States, as applied to each area alleged to have been curtilage.

4. Steps taken by the resident to protect the area from observation by people passing by

The Court finds the final *Dunn* factor also tips in favor of the United States. The area surrounding the residence, including the exterior of the home and the driveway, is observable by the public—at any hour of the day— as a result of its intimate connection to the storage grounds and office. At the hearing, Mr. Powell did present evidence of his attempts to exclude the public from certain areas of the property, by way of a "no trespassing sign," a sign on the door of the residence/office building, and a fence enclosing a portion of the property. The Court would note, however, that none of these devices were

[3] At the very least, evidence showed that Mr. Powell used the driveway to store bikes. (Gov't Ex. 8).

calculated to exclude the public from the northeastern and northwestern areas of the building around which the officers walked.

While it is well established that commercial properties, like residential properties, enjoy the protections of the Fourth Amendment, "the occupant of a commercial building must take the additional step of affirmatively barring the public from the area because a business operator has a reasonable expectation of privacy only in those areas from which the public has been excluded." *Dunn,* 480 U.S. at 314. Moreover, courts have agreed, "[i]f police using the naked eye or ear are able to see or hear while located on adjoining property or even on property of the business which is readily accessible to the general public, this is not a search. . ." *Id.* at 316-17 (citing *Norman v. State*, 379 So. 2d 643, 647 (Fla. 1980)).

In this case, the residence was not clearly marked as separate from the surrounding storage facility and the deputies relied solely upon their natural senses to observe the smell of marijuana. The area surrounding the residence is a commercial storage facility and could hardly be described as an extension of the home in which an occupant would expect to enjoy the same "privacies of life" as he would enjoy in the "sanctity" of the home. *Hatfield*, 333 F.3d at 1195. Given the balance of the *Dunn* factors, as well as the lack of demarcation around the residence to distinguish it from a public facility, the Court concludes the walkway and driveway, which the deputies traversed in execution of the "knock and talk," do not fall within the definition of curtilage.[4]

[4] Even if the driveway and other area surrounding the home could be properly characterized as curtilage, the deputies' conduct was reasonable in light of precedent observed by this Court. *See U.S. v. Schuck*, 713 F.3d 563, 567 (10th Cir. 2013); *Hatfield*, 333 F.3d at 1194 (citing 1 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 2.3(f)). *See also See United*

CONCLUSION

The testimony and exhibits presented at the hearing, balanced against the weight of case law in this jurisdiction, establish that the deputies were lawfully on the premises when they smelled marijuana, and thereby generated probable cause to apply for a search warrant. The issuance of the search warrant on January 16, 2019 did not constitute a violation of Mr. Powell's Fourth Amendment rights such that evidence seized pursuant to the warrant must be excluded.

IT IS ORDERED that Defendant's Motion to Suppress Evidence is DENIED.

Dated this 20 day of September, 2019.

NANCY D. FREUDENTHAL
UNITED STATES DISTRICT JUDGE

States v. Reyes, 283 F.3d 446 (2d Cir. 2002); *United States v. Hammett*, 236 F.3d 1054 (9th Cir. 2001); *States v. Daoust*, 916 F.2d 757 (1st Cir. 1990); *United States v. Anderson*, 552 F.2d 1296 (8th Cir. 1977).